

**Interagency Task Force
on Employee
Misclassification**

Monday, June 30, 2008
Michigan Liquor Control
Commission
Hearing Room 2 – 1st Floor
24155 Drake Rd.
Farmington, MI 48335

MINUTES:

Task Force Attendees: Lt. Governor John D. Cherry Jr., Keith W. Cooley (Chair), Chris Peretto, Jack Finn, Jack Nolish

The meeting was called to order at 9:00 a.m.

Opening Remarks

Director Cooley welcomed everyone to the meeting and gave an overview of the agenda for the meeting, and introduced Lt. Governor Cherry.

Lt. Governor Cherry thanked the Task Force and said that employee misclassification is a problem that is a national problem. It does require investment on the part of the state. The problem has severe implications in Michigan. Our failure to enforce the problem of employee misclassification results in significant drainages of money from income tax revenues, Unemployment Insurance revenues and Workers Comp funds. Nationally, that's about \$3 billion across the US. It's not just a problem for state government, it's a problem for those who do withhold their taxes. They are at a competitive disadvantage. Employees who work for those employers are hurt as well. The problem is often times it's difficult for one agency to nail down the type of violation that is occurring. That is why the governor has appointed a multi-agency task force to look at the problem, look at what you present and come together to work on cooperative enforcement activities to ensure we are adequately fighting misclassification.

Presentation on Employer Misclassification

A 10 minute Power Point presentation was shown highlighting Executive Order 2008-1 on Employee Misclassification, Duties of the Task Force Committees, Scheduling, Governor Granholm's Charge to the Task Force, Reasons Why Employee Misclassification is Harmful, Economic Reality Test and Contact Information.

Public Comments

- **James Budd, Brick Layers & Allied Craft Workers Local 9**
I'm here to talk about what I've run across as a field rep. I first ran across this situation with the plasterers. I came across guys who ran around from job to job approaching companies who already had employees and would then ask if they would hire them on as sub contractors. They would be hired on by the square foot. These fellows would carry 3 pieces of ID with them all being different. Another situation I ran into was a company who was missing a number of school projects. I did job site visits and found that the contractor that was subbing the work and the construction manager were hiring a number of sub contractors to do that work. On one job site there were seven different sub contractors doing the tile work. As I talked to them, I found they also had helpers. Some of them were doing the work themselves, but one worker said, "I can't believe these are not prevailing wage jobs." Well it was a prevailing wage job. Nobody knew it was a prevailing wage job.

Apparently it was not posted on the work site. I understand it was in the construction manager's trailer. Most of the people working would not go into the construction manager's trailer, so I would argue that that's not right. Each of those individual contractors, although they may have a policy for workers compensation are not actually covered by that policy because that's for covering employees, and you are not set up as an employing company. You would not be paying into the appropriate unemployment or you would have the opportunity to evade the taxes and that's what I would like to argue these plasterers were doing. When I approached the construction managers about this situation, their response was that all their paper work was in order. They knew they had people violating the prevailing wage.

Q – You mentioned some of the sub contractors on the tile job had helpers. How were the helpers classified?

A – According to the individual company owner, those helpers were also individual company owners. They were 1099 as well, although some of them I know were being paid by the hour and not at the prevailing rate. When I contacted Wage and Hour about this situation, they told me there wasn't a whole lot they could do about it because they can't prove they were not making the prevailing rate when the work is being subbed out by the square foot.

Q – My question would be what evidence can I get when I'm out working in the field to help you do your job? What do you need from us?

A – The seven Economic Reality points that were up there would be elements of the things we would like to know. That was a good point about the prevailing wage rate not being posted. I think we should address that. We have to have it posted as publicly as can be. If there is an opportunity to get any of the folks that were working to speak up about their role as a contractor or worker or about wages or any of the other things that were mentioned, that would be very helpful.

Comment: I am willing to give you all the information I can gather. The helpers tend to stay pretty quiet to maintain their jobs.

Director Cooley: Is this something that is going on now?

Response: Yes this is going on for sure. I turned in some information to Joyce Surprenant on four different prevailing rate projects which the same company had the contract for.

Director Cooley: You have done exactly what I was going to ask. We will try to see if we can get an investigator over. Enforcement is at the top of the list. You will find we will have to take the most important cases first, as we are a little understaffed but we will try to find a way to get to the sites you mentioned.

Comment: There is an issue of feedback. I'm not sure I'm getting you the information you need if I don't get any feedback. If we could bring to their attention that the laws are being enforced, that would help our good and upright contractors.

RESPONSE: We will figure out a way to let you know if we have or have not been to the site, or that it's under investigation

Jack Nolish: Under the Workers Compensation Act when you have what are thought to be independent contractors, if they are injured on the job and they file a claim with the Workers Comp Agency, we make an independent determination case by case as to whether someone is or is not an employee. If we determine they are an employee and if they are an employee of an uninsured sub contractor, the coverage available from the general contractor is responsible for the injured. On some of the larger projects, we issue wrap around approval coverage where everybody on that job site is an employee. If you find somebody that's injured who thinks they are 1099, have them contract us. If you find out there is one of those entities, we will go after them. The penalties we assess are not subject to the corporate shield. We can go pass that.

Q – What if they are not injured?

A – If there is no injury, it's not a workers comp issue. If you find there is a group being misclassified who should be covered, we can look at that before there is an injury. The corporate shield, for those of you who don't know, is that we can go after the person and not just the company.

■ **Rick McHugh, National Employment Law Project**

I know that the Workers Compensation Agency and the Unemployment Insurance Agency have been taking a stronger look at SUTA dumping in the UI area and getting data from the IRS that tends to show if someone has a lot of 1099s and targeting enforcement of those employers. We

have the economic reality test in Michigan. Most people think that is a good test in that it will properly identify most employment relationships and not permit employers to shield some relationships that are probably in reality employment under an independent contract label. What I would like to respectfully disagree with is the idea that a lot of this activity is inadvertent. There's a really strong economic incentive on the part of employers to avoid labeling relationships as employment relationships.

I wanted to hire a part-time research attorney in Ann Arbor and the bookkeeper in New York asked why we were hiring her as an employee and not an independent contractor. By her training, the bookkeeper was inclined to tell employers whenever possible, use someone as an independent contractor. This research attorney was going to be working in her own home with a flexible schedule. She probably could be called an independent contractor as an attorney. I explained that was not our policy, we wanted to have an employee.

One of the sadder situations I have known about is in New York in some of the high-end restaurants there is someone in the bathroom with hot towels. There were several restaurants that were having these people rent the space in the bathroom and were not paying them anything. They supposedly were not employees.

There is a report where farm workers signed an agreement saying they were patent licensees for patented strawberries. Their job was to plant, cultivate, weed and harvest them and for that they would receive a patent licensing fee. There are a number of states that have statutory employees where if you work in a certain industry for a fee you're an employee.

- **Tyler McCastle, Michigan Regional Council of Carpenters**

In the construction industry, some of the workers we run into don't have an option. Many times they are forced into 1099 work or will be fired. I believe there is a huge need to bring back the legitimacy to the low bid project. Maybe if you could partner with law enforcement that would help. Some of the things we run into beyond the 1099 is people who are working for cash and being paid with gift cards. In many of the projects there are no payments at all. When we talk to some of the workers we find out they will have worked for 2 or 3 weeks at a time and then let go. If there is a Task Force or enforcement agency put together it would more than fund itself and we could afford to do a lot more projects in the state once we get a handle on it.

- **Chad Miller, Michigan Regional Council of Carpenters Local 525**

One way the state could better enforce the laws would be an education concept. You could put out a flyer about employment rights and notify employers of the same. Let employers know they might have people employed incorrectly. Some insurance industry people may not care about employee coverage because they don't want to lose their client. If they try to crack down on fraud, the employer would just go to another insurance company. A company from Rockford had a large building contract and was issuing between 4 and 10 1099s which is a really small number. But he would hire a person on a verbal contract to do one floor for \$.20 per foot and each floor had their own crew. Each person would issue about 4 to 10 1099s. We should investigate by dollar volume and then by the number of 1099s issued.

Q – When the state tries to enforce the law are they going to go after the worker or the employer? You are about to experience a generation of people who think a 1099 is okay. I think it needs to be brought out through an educational piece.

Director Cooley: One of the sub committees is education and we will be working to get the information out. This is an employer problem. If in the investigation it is brought out that a person is not filing income tax, or other things they need to do, that causes a different set of problems. We believe the problem is employers not employees. We will work with employers and employees. Workers Comp and Unemployment Insurance is the employer's responsibility, not the employees. Third party complaints can be filed by a labor union or by another contractor.

- **Scott Lowes, Michigan Regional Carpenters**

This is like the black market of construction. You are concentrating on prevailing wage jobs, but just drive down the street and look at some of the jobs people are doing. You would be amazed at the number of people who are working for cash. I looked at the penalties. They're not big enough to put

fear in companies for breaking the law. Out of state employers are working here but not paying into Michigan Unemployment and Workers Comp. When someone doesn't get a job because their price is too high, and someone else gets the bid because they are paying people under the table and come in at a lower price it is not right. It's just not a fair playing field.

Cooley: If you are collectively aware of who the big dogs are, we would like to know.

Response: Your big general contractors that do your school work...if they realize and know there are big penalties and they know they wouldn't get any more jobs, I think that would help stiffen up what's going on on these job sites.

Q – If the state gets the federal tax tapes that show who issued and received 1099s, is it possible to sort by industry codes? If you could sort by dollar amount or by the number issued, that should tell you who the big dogs are.

Chris Peretto: We do have the 1099 information. We do go through and do sorts, but if someone is issuing 10 1099s and someone else is issuing another 10, sometimes it's difficult to find out who the targets are. We have a pilot where we are going to do a letter audit. It's going to put employers on notice that this is a potential problem so it will be hard for them to turn around and say they didn't know.

■ **Dan Watson, Michigan Laborers Local 1076**

Q – The information that you presented earlier, will that be available on the web site?

A – We are going to have it up on the website. The contacts are on the bottom of the agenda.

Q – When is the report going to the governor?

Susan: The report is going to the governor tomorrow and will probably be ready Wednesday on the website.

Closing Remarks

The meeting was adjourned at 10:15 a.m.